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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Service	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF
CABLEVISION LIGHTPATH, INC. AND NEXTLINK COMMUNICATIONS, INC.

David Ellen, Esq.
Senior Counsel
Cablevision Lightpath, Inc.
1111 Stewart Avenue
Bethpage, NY 11714
(516) 390-5911

Daniel Gonzalez, Esq.
Director, Regulatory Affairs
Alaine Miller
Director, Regulatory and Public Policy
NEXTLINK Communications, Inc.
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, DC 20036
(202) 721-0999

Christopher J. Harvie
Tara M. Corvo
Uzoma C. Onyeije
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004-2608
(202) 434-7300

Counsel to Cablevision Lightpath, Inc. and NEXTLINK Communications, Inc.

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CABLEVISION LIGHTPATH, INC. AND NEXTLINK COMMUNICATIONS, INC.

Cablevision Lightpath, Inc. ("Lightpath")[1/] and NEXTLINK Communications, Inc. ("NEXTLINK")[2/], through their attorneys, hereby file these comments in response to the Commission's July 7, 1999 Notice of Inquiry in the above-captioned docket.[3/]

As detailed below, Lightpath and NEXTLINK urge the Commission to affirm concretely that the competitive neutrality and non-discriminatory requirements of Section 253 of the

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1/ Lightpath is a facilities-based competitive local exchange carrier that provides basic and advanced telecommunications services, including residential local exchange service in parts of New York and Connecticut. Lightpath has plans to further expand these services in other areas.

2/ NEXTLINK and its affiliates provide local, long distance, and enhanced services over local and national fiber optic networks in markets across the United States. Among other areas, NEXTLINK and its affiliates currently provide telecommunications and enhanced services in New York City, Chicago, Los Angeles, San Francisco, Dallas, Denver, Miami, Philadelphia, Washington, D.C. and Seattle.

3/ <u>In the Matter of Promotion at Competitive Networks in Local Telecommunications Markets</u>, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-17 (rel. July 7, 1999) ("Notice").

Telecommunications Act of 1996 ("1996 Act") flatly preclude any municipality from enacting and enforcing a local ordinance which subjects new entrants to regulatory burdens and fees that are not imposed on the incumbent local exchange carrier ("ILEC") serving that municipality. Equally important, the Commission also should make clear that various ad hoc justifications offered to buttress discriminatory local arrangements – such as differences between carriers' service offerings or universal service obligations – are untenable and in violation of Section 253. Local ordinances and fee requirements either must be imposed on all telecommunications providers in a non-discriminatory manner, or they may not be imposed on any providers.

INTRODUCTION AND SUMMARY

The 1996 Act established "a pro-competitive, de-regulatory national policy framework" designed to open local markets to competition and accelerate rapidly the deployment of new networks and technologies.[4/] Lightpath and NEXTLINK are putting substantial capital and resources into fulfilling the 1996 Act's core objectives by entering local markets that have been dominated for decades by ILECs. Both Lightpath and NEXTLINK are entering these markets as facilities-based carriers, thereby increasing both the risks and investment levels attendant with the daunting task of challenging the ILECs' local exchange monopolies. The speed, costs and ultimate success of competitive entry into new markets is directly affected by the degree of local regulation imposed upon competitive local exchange carriers ("CLECs").

The risks and burdens associated with challenging incumbent local monopolists rise significantly in markets where local regulatory obligations and fees are imposed upon CLECs but not on ILECs. Such regulatory disparities deter competitive entry and strengthen the ability of

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[4/] H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. (1996) ("Conference Report") at 1.

ILECs to perpetuate their market power by providing them with substantial cost and regulatory advantages over new entrants. Competitors may be forced to decide between foregoing entry into a potentially viable market, or accepting disparate obligations and then litigating the matter on a market-by-market basis – assuming that they have not had to negotiate away their right to challenge local entry requirements that violate Federal law.[5/] As the Commission itself has recognized in defending the local competition rules issued under Section 251, case-by-case litigation to vindicate the requirements of the 1996 Act — here, Section 253's mandate of competitive neutrality — is time-consuming and resource-intensive for CLECs, and unduly delays the emergence of local competition.

While some states and municipalities have sought to apply local telecommunications ordinances to ILECs and CLECs alike, a significant number of others subject new entrants to one-sided local franchising schemes that include substantial fee requirements.[6/] In addition to their discriminatory impact, these schemes may contain franchising and fee requirements (imposed on a flat fee, per-line, per-mile of right-of-way occupied or used, or percentage of gross revenues basis) that are unrelated to a carrier's right-of-way usage or the costs associated with a municipality's management of its rights-of-way — and thereby contravene the Commission's admonition against redundant "third tier" telecommunications regulatory regimes.[7/]

Several Federal judicial decisions have invalidated local ordinances (or significant portions thereof) that subject carriers to requirements and fees that exceed the limits on local

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5/ See infra at pp. 11-12.

6/ See infra at Section I.

7/ See, e.g., Classic Tel., Inc., 11 FCC Rcd 13082 (1996); TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption, and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253, 12 FCC Rcd 21396 (1997); recon. denied, 13 FCC Rcd 16400 (1998) ("Troy").

right-of-way management authority imposed by Section 253.[8/] A handful of courts, however, have erroneously upheld such ordinances,[9/] thereby emboldening some localities to continue efforts to subject carriers to burdensome franchising schemes and excessive fee requirements. Accordingly, in addition to addressing the important discrimination issues raised below, the Commission should use this proceeding to make clear that the 1996 Act prohibits municipalities from adopting regulations that are unrelated to a carrier's use of the rights-of-way or imposing fee requirements that generate revenues in excess of local right-of-way management costs.

Most troubling of all, however -- and the focus of the instant comments -- are local ordinances which result in the imposition of franchising and fee obligations only on CLECs. Notwithstanding the competitive parity mandate of Section 253, ILECs have maintained that they are exempt from franchising and fee requirements imposed on CLECs by local municipalities in Missouri, New York, Arizona, Michigan and other areas around the country. ILECs argue that their insulation from local ordinances stems from statewide franchise rights which provide them (or their predecessors) plenary authority to maintain network facilities and furnish services in any locality within the state. As a matter of State law, these grandfathered

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[8/] See, e.g., Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland, 49 F. Supp. 2d 805 (D. Md. 1999) ("Bell Atlantic"); AT&T Communications of the Southwest, Inc. v. Dallas, 8 F. Supp.2d 582 (N.D. Tex. 1998) ("Dallas I") (granting motion for preliminary injunction); AT&T Communications of the Southwest, Inc. v. Dallas, 1998 U.S. Dist. LEXIS 10297 (N.D. Tex. 1998) ("Dallas II") (granting motion for preliminary injunction); AT&T Communications of the Southwest, Inc. v. Dallas, 1999 U.S. Dist. LEXIS 7227 (N.D. Tex. 1999) (granting motion for summary judgment); AT&T Communications of the Southwest, Inc. v. Austin, 975 F. Supp. 928 (W.D. Tex. 1997) ("Austin I") (granting motion for preliminary injunction); AT&T Communications of the Southwest, Inc. v. Austin, 1998 U.S. Dist. LEXIS 11508 (W.D. Tex. 1998) ("Austin II") (granting permanent injunction); BellSouth Telecommunications, Inc. v. Coral Springs, 42 F. Supp. 2d 1304 (S.D. Fla. 1999) ("Coral Springs"); BellSouth Telecommunications, Inc. v. Palm Beach, Case No. 98-8232-CIV-DIMITROULEAS (S.D. Fla. Sept. 28, 1999).

rights – which usually date back to the 19th century – may not be so broad as to insulate ILECs from legitimate exercises of right-of-way management authority in a competitive environment. After passage of the 1996 Act, however, that question is largely academic since, as a matter of Federal law, disparate imposition upon CLECs of local regulations and fees violates Section 253.

Asymmetrical local ordinances (or uneven enforcement of such ordinances) run afoul of the limits on right-of-way management authority established in Section 253(c), which affirmatively obligates local municipalities to manage their rights-of-way in a competitively neutral and non-discriminatory manner. Section 253 requires that similarly-situated carriers be subject to the same local regulatory and fee obligations. CLECs cannot be subject to regulatory burdens and fees from which ILECs are exempt in order to use local rights-of-way in the same manner as the incumbent carriers. Localities must impose local regulatory obligations and fee requirements on all providers in a non-discriminatory manner, or they must refrain from imposing such requirements at all.

Some localities have maintained that regulatory and fee disparities may be justified based upon a carrier's status as an ILEC or a CLEC, differences in the type of services offered over a carriers' facilities, or variances in carriers' universal service obligations. These justifications are unavailing and conflict with the language and purpose of Section 253. While differential treatment of carriers that "use" local rights-of-way differently may be justifiable (there is little dispute that a carrier that uses 100 feet of rights-of-way in a particular locality may be treated differently from a carrier using 100 miles of rights-of-way), local ordinances may not distinguish

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[9]/ See, e.g., TCG Detroit v. Dearborn, 16 F. Supp. 2d 785 (E.D. Mich. 1998), appeal filed (6th Cir. Sept. 5, 1998) ("Dearborn"); Omnipoint Communications, Inc. v. Port Authority of New York and New Jersey, 1999 U.S. Dist. LEXIS 10534 (S.D.N.Y. July 13, 1999).

between carriers based upon the mix of services provided or due to variances in universal service obligations. Indeed, Congress expressly adopted a mechanism for preserving and advancing universal service in a competitive environment, and localities were granted no residual authority to use their management over local rights-of-way to address universal service issues.

In order to preserve and advance the competitive objectives of the 1996 Act, the Commission should use this proceeding to reaffirm in the strongest possible terms that "right-of-way regulations that, either explicitly or in practical effect, favor incumbent LECs over competing carriers" are flatly prohibited under Federal law.[10/] Because some municipalities continue to enact or enforce local ordinances that impose disparate obligations on CLECs vis-à-vis ILECs, the Commission should take this opportunity to clarify the legal landscape and unequivocally convey that such practices violate the 1996 Act and cannot be saved by ad hoc justifications unrelated to differences in local rights-of-way usage.

The Commission's powers under Section 201(b) of the Act, as construed by the Supreme Court in the Iowa Utilities Board decision, clearly grant it ample authority to provide policy guidance and issue rules concerning the market-opening, competitive neutrality mandate of Section 253. Failure to act promptly will delay the onset of competition and relegate critical, market-opening issues to unnecessary, expensive and time-consuming litigation. By contrast, many municipalities may actually welcome the policy guidance sought herein, since it will empower them to resist ILEC efforts to perpetuate exemptions and special privileges that are no longer permissible due to the competitive neutrality mandate of the 1996 Act.

[10/] Cf. Notice at ¶ 75.

I. CLECS MUST CONTEND WITH DISCRIMINATORY RIGHT-OF-WAY ORDINANCES IN A NUMBER OF SIGNIFICANT LOCAL MARKETS AROUND THE COUNTRY

In the Notice, the Commission observes that local right-of-way ordinances and fees that have a discriminatory impact on new entrants "are inimical to competition and are not consistent with Section 253."[11/] Unfortunately, this message has not been taken to heart in a number of local markets around the county.

In several significant local markets, CLECs are forced to contend with local right-of-way ordinances that unreasonably and unjustifiably impose disparate burdens and requirements on new entrants relative to the incumbent local providers. New entrants that are already tackling the daunting challenge of competing against entrenched local telecommunications monopolists in the marketplace frequently encounter additional entry obstacles in the form of local regulatory obligations and fee requirements that are imposed upon CLECs but not on ILECs.[12/]

Many of these ordinances contravene Section 253 not only because they have a discriminatory impact on new entrants, but also because they seek to impose fees and obligations that are unrelated to local rights-of-way management, and thereby represent the type of "third tier" regulation that the Commission and several courts have determined to be in excess of municipal authority under Section 253.[13/] While NEXTLINK and Lightpath focus in these comments on municipal attempts to impose disparate regulatory schemes on new entrants, they

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[11/] Notice at ¶ 76.

[12/] See Comments of NEXTLINK, Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217 at 3-6 (filed Aug. 27, 1999).

[13/] See Troy, 12 FCC Rcd at 21441-42, ¶¶ 105-06; Dallas I, 8 F. Supp.2d at 591-92; Dallas II, 1998 U.S. Dist. LEXIS 10297 at *15-19; Bell Atlantic, 49 F. Supp. 2d at 816-17.

regularly encounter municipal attempts to impose unlawful "third tier" ordinances and excessive fee requirements as well.[14/]

In many instances, CLECs must devote substantial and precious time, resources and capital to negotiating entry agreements or arrangements aimed at providing them with equal and non-discriminatory treatment vis-à-vis the ILECs. Too often, these negotiations fail to achieve that simple and fundamental objective, thereby necessitating costly and time-consuming case-by-case litigation. Additionally, as each new local ordinance is enacted, other municipalities, especially those in surrounding geographic areas, are prompted to enact similar ordinances, so that they can exercise similar authority over local telecommunications service providers and procure similar revenues for their citizens. Further, many local ordinances contain "most favored nations" ("MFN") provisions, which require CLECs to grant municipalities the option of invoking the terms of any other right-of-way agreement into which the CLEC enters.[15/] Such provisions are particularly problematic, since CLECs often are forced to accept such onerous language out of business necessity to enter a market, and yet the fact of their "voluntary"

[14/] See generally Comments of the Association for Local Telecommunications Services, In The Matter of Promotion of Competitive Networks in Local Telecommunications Markets, CC Docket No. 96-98 and WT Docket No. 99-217 (Oct. 12, 1999) ("ALTS Comments") (discussing municipal attempts to impose third tier regulations on telecommunications service providers).

[15/] Many of these MFN provisions are not reciprocal. Municipalities remain free to grant more favorable right-of-way access terms to any new entrant seeking to provide service without having to grant the benefit of those more favorable terms to existing providers.

agreement is used against them.[16] Lightpath and NEXTLINK have encountered these problems throughout the country as they attempt to enter new markets and begin providing service.[17]

In Missouri, after attempting to gain access on nondiscriminatory terms to the rights-of-way for nearly a year, NEXTLINK has been forced to institute litigation against the City of Maryland Heights.[18] Maryland Heights seeks to impose substantial revenue-based fees for use of the public rights-of-way, based upon NEXTLINK's provision of private line and special access services. Even though Southwestern Bell provides those same services, Maryland Heights does not impose any fee on Southwestern Bell for use of the public rights-of-way to provide those services. Instead, Maryland Heights permits the incumbent carrier, Southwestern Bell, to occupy the public rights-of-way free of charge.[19] While Southwestern Bell is subject to a municipal tax on telecommunications providers based on a percentage of its gross revenues, which Maryland Heights characterizes as payment for use of the rights-of-way to provide local

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[16] In Dearborn, the Court relied on the fact that other telecommunications providers had "voluntarily" agreed to be subject to the terms of the challenged ordinance as evidence that the terms were fair and reasonable. 16 F. Supp. 2d at 790.

[17] For example, in University City, Missouri, NEXTLINK was able to enter the market only if it agreed to sign an agreement that provided that "In the event that NEXTLINK … agrees to pay [another political subdivision in the St. Louis metropolitan area] compensation under any such agreement at a rate that exceeds the compensation rate required under this Agreement … the City shall have the option to replace the compensation terms stated in … this Agreement with the compensation terms applicable to NEXTLINK in that political subdivision." University City Ordinance No. 6213 (Aug. 1, 1999), ¶ 25.

[18] NEXTLINK Missouri, Inc. v. City of Maryland Heights, Missouri et al., Civil Action No. 4:99CV01052CET (E.D. Mo.). The litigation originally included other St. Louis area municipalities as well, where NEXTLINK faced similar difficulties in obtaining lawful agreements to use the rights-of-way. Only after NEXTLINK instituted litigation did these municipalities allow NEXTLINK access to the rights-of-way.

[19] Further, the fees Maryland Heights seeks to impose on NEXTLINK are not related to Maryland Heights' costs in managing and maintaining the rights-of-way, or to the relative burden NEXTLINK seeks to impose on the rights-of-way vis-à-vis other users of the rights-of-way, but rather are unlawfully based on NEXTLINK's annual revenues. In order to settle a preliminary injunction motion, Maryland Heights has agreed to grant NEXTLINK acccess to the public rights-of-way, subject to retroactive payment for use of the rights-of-way in accordance with the results of the litigation.

exchange service, NEXTLINK is also subject to this tax, in addition to the annual rights-of-way fee from which Southwestern Bell is exempt. Clearly, such a regulatory scheme grants Southwestern Bell a significant competitive advantage, and makes it more difficult for NEXTLINK, burdened by extra costs not faced by the incumbent, to effectively compete for customers.

Maryland Heights justifies this disparity by arguing that NEXTLINK should pay additional fees for the privilege of providing long distance service (which Southwestern Bell does not provide) over the rights-of-way, and by maintaining that it is prevented from imposing rights-of-way fees on Southwestern Bell under the terms of a statewide franchise granted Southwestern Bell in the late 1800s, and thus the City will face litigation from Southwestern Bell if it attempts to apply the fee requirements even-handedly. In fact, however, Southwestern Bell places a significantly greater burden on the rights-of-way, since its facilities are much more extensive than those planned by NEXTLINK. Maryland Heights further worsens the disparity among telecommunications providers by subjecting each competitive provider who approaches the City to different conditions of access. NEXTLINK's attempt to gain access to the Maryland Heights rights-of-way on the terms and conditions granted a competitive access provider ("CAP")[20/] was rejected by the City Council, which sought additional or different compensation from NEXTLINK based on the services NEXTLINK plans to offer.

[20/] NEXTLINK believed that those terms and conditions were unlawful as well, particularly because such an agreement would have prohibited NEXTLINK from providing local telephone service, but was willing to enter into the agreement and forego the market, because it desperately needed access to Maryland Heights, where its business and construction plans called for the switch for the entire St. Louis network to be located.

Similar disparate treatment is common among municipalities which impose per linear foot-based rights-of-way fees. In many municipalities in the St. Louis area, NEXTLINK has been singled out vis-a-vis CAPs, and is required to pay a fee that is approximately three and one-half times the amount of the CAP fee for use of the rights-of-way. The rights-of-way fee imposed on CAPs is not imposed on Southwestern Bell.

In certain areas of New York, Lightpath, NEXTLINK and other competitors have been required to obtain an extensive local franchise and comply with numerous burdensome provisions that are unrelated to the management of carriers' physical occupation of the public rights-of-way. The City of White Plains, for example, provides new entrants with a franchise agreement that, among other things, obligates them to pay the City an annual franchise fee equal to five (5) percent of "Gross Revenues."[21/] Under the agreement, carriers must pay White Plains a franchise fee even in the event that a court declares the franchise fee illegal, and also must pay the City a $50,000 fee in the event of a transfer of ownership.[22/] Further, the franchise agreement directs competitors to construct underground conduit for the City's use free of charge and at their own expense;[23/] to represent and warrant that the franchise agreement does not conflict with any provisions of any laws; and to "expressly waive, to the maximum extent

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[21/] See TCG New York, Inc. v. City of White Plains, 99 CIV 4419 (S.D.N.Y.), Complaint of TCG at 10 (June 18, 1999) ("TCG White Plains Complaint"); see also Answer of City of White Plains (July 12, 1999) ("White Plains Answer") at 6, 8 (admitting that proposed franchise agreement challenged in complaint was modeled on agreement entered into by City with another CLEC). Gross Revenues are broadly defined as including all "payments made to, or compensation in any form whatsoever received directly or indirectly by [a carrier] . . . in connection with operation of the Fiber Optic Network, or the provision of Service over the Fiber Optic Network." TCG White Plains Complaint at 11.

[22/] Id. at 10-11, 13.

[23/] Id. at 11.

permitted by law, any claim it may then or thereafter have as to the validity or unenforceability of the terms of the agreement."[24/]

By contrast, Bell Atlantic is not subject to the type of franchising and fee obligations required of new entrants in White Plains, New York City and other areas of New York state. Bell Atlantic's exemption from these requirements ostensibly stems from the source of its original authority to provide service in localities throughout the State: a statewide franchise granted under a nineteenth century law that accorded rights which were grandfathered by subsequent State laws.[25/] Bell Atlantic's advantage in New York is exacerbated by the fact that new entrants may be denied permission to construct, operate and maintain facilities in public rights-of-way until they accept franchising and fee obligations from which their principal competitor is exempt. In some instances this has resulted in carriers, at least temporarily, foregoing the construction of their own facilities in public rights-of-ways, thereby delaying the emergence of competition.[26/]

Similarly, in Michigan, competitive carriers have been saddled with one-sided rights-of-way obligations while the incumbent was subject to substantially less burdensome and more favorable terms. In the Troy case, the Commission itself recognized that Michigan localities have advanced arguments "that the incumbent providers occupy a favored position vis-à-vis the state and local governments because of the way the provision of telephone service and its

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24/ Id.

25/ See White Plains Answer at 6 (admitting that Bell Atlantic does not have same obligations as competitors).

26/ See TCG White Plains Complaint at 18 ("The City's failure and refusal to grant Plaintiff's permission to place and maintain facilities in the public rights-of-way ... has the effect of prohibiting Plaintiffs from providing telecommunications services in violation of 47 U.S.C § 253(a).").

regulation have evolved over the last century."[27] Indeed, CLECs in Dearborn Michigan have been saddled with one-sided rights-of-way obligations. In 1994, the city of Dearborn passed an ordinance that required telecommunications providers who wished to utilize the city's rights-of-way to enter into a franchise agreement with the city. For example, TCG was required to pay a franchise fee of 4% of its gross revenues and a one-time $50,000 payment to the city as a condition of entry into the local market in Dearborn.[28] The incumbent carrier in Dearborn, Ameritech, was not subject to these franchise and fee requirements.[29]

In Maryland, Bell Atlantic attempted to argue that it enjoys a pre-existing privilege granted by the state that permits it to have free access to rights-of-way in that state in perpetuity.[30] Essentially, Bell Atlantic argued that it has a statewide franchise granted in 1884, and later amended, for the right to construct its telephone lines across Maryland at its own expense.[31] Bell Atlantic claims that this perpetual franchise bars local fee payments and that any such payments would result in "great commercial risk and expense."[32] Thus, Bell Atlantic contended that it was exempt from a Prince George's County ordinance that would require all carriers using rights-of-way in the County to apply for a franchise from the County and pay a 3% revenues franchise fee.[33]

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[27] Troy, 12 FCC Rcd. at 21442, ¶ 107.

[28] See Dearborn, 16 F.Supp.2d at 793.

[29] Id.

[30] See Complaint of Bell Atlantic - Maryland, Inc., Civil Action No. JFM98CV4187, ¶¶ 4-8 (D. Md.) ("Bell Atlantic Complaint").

[31] See Bell Atlantic Complaint ¶¶ 3-4.

[32] Id. ¶ 5.

[33] While Lightpath and NEXTLINK concur with the Federal court's correct ruling that the franchise fees and regulatory requirements established in the Prince George's County ordinance exceeded the

In King County, Washington, NEXTLINK is subject to a right-of-way ordinance that on its face applies to "wireline communications companies," but from which US WEST and GTE are exempt.[34/] The ordinance imposes substantial burdens, including payment of a one-time fee and annual fees for use of the rights-of-way, bonding and insurance requirements, and other "third tier" requirements unrelated to use of the rights-of-way, such as non-discrimination "in all hiring or employment made possible or resulting from this permit" and an obligation to "make opportunities for employment and/or contracting services available to women and minority persons."[35/]

NEXTLINK and Lightpath face additional difficulties obtaining equal treatment when states not only have old laws on the books that ILECs can rely on to claim exemptions, but when states pass new laws specifically exempting ILECs from municipal telecommunications franchising and fee ordinances. For example, the Arizona Fiber Optics law provides specific exemptions for any entity who "was, or whose predecessor was or predecessors were ... furnishing public telephone or telegraph services within the state prior to the effective date of the Arizona Constitution."[36/] Similarly, the statute that authorizes local licensing of telecommunications providers exempts "any telecommunications corporation that was providing telecommunications service ... pursuant to a grant made to it or its lawful predecessors prior to

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County's right-of-way management authority and therefore violated Section 253, Bell Atlantic, 49 F. Supp. 2d at 816-17, the County at least attempted to apply the ordinance in an even-handed manner, notwithstanding Bell Atlantic's arguments regarding its privileged state law position. Unfortunately, many localities have not made similar efforts, thereby triggering the need for Commission action.

[34/] Emergency Order Designating Voluntary Process for Allowing Wireline Communication Companies Construction Access and Use of County Road Right-of-Way (May 20, 1999).

[35/] Id., Exhibit A, §§ 8, 13, 19, 22.

[36/] Ariz. Rev. Stat. § 9-565(B).

the effective date of the Arizona Constitution."[37] Since the effective date of the Arizona Constitution is February 14, 1912, US WEST is virtually the only entity that benefits from these exemptions.

As these examples indicate, the discriminatory impact of many local right-of-way ordinances often derives from the ILECs' claim that they are exempt from right-of-way fees or local franchising obligations under the terms of statewide franchises granted them in the past -- often one hundred years ago or more. There is an open question as to whether the contractual and/or statewide rights invoked by the ILECs provide them with as much insulation from local regulation as they claim upon examination.[38] It may well be that the terms of these statewide franchises are not nearly as broad as the ILECs claim, and would not prevent municipalities from subjecting ILECs to requirements imposed on other telecommunications carriers, which would lessen the CLEC's competitive disadvantage. Indeed, some localities have attempted to apply telecommunications ordinances on an even-handed, across-the-board basis, notwithstanding claims of exemption advanced by the ILECs.[39]

After the 1996 Act, however, the issue of whether these statewide franchises be construed to justify disparate treatment of ILECs under local right-of-way ordinances is now moot. Section 253 was designed precisely to root out and eliminate the types of embedded legal and regulatory advantages claimed by the ILECs. New entrants must have "the ability to utilize public rights-

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[37] Ariz. Rev. Stat. § 9-582(E).

[38] In New York, for example, the breadth of insulation from local regulation claimed by Bell Atlantic arguably is not justified by the scope of the nineteenth century state law rights that purportedly provide the exemption.

[39] See Bell Atlantic Complaint, ¶ 11; see also ALTS Comments (discussing states like Illinois and Florida, which have passed statutes to curb unfair and discriminatory municipal action regardless of historical ILEC statewide franchises).

of-way in a manner, on a scale, and under terms and conditions similar to those applicable to the incumbent LECs' use of public rights-of-way."[40/] If ILECs cannot be subjected to municipal right-of-way ordinances under state law, then CLECs must be exempt as well. Any attempts to rely on ILEC's protected status under state law to justify disparate municipal treatment of incumbent and competitive providers must fail under the 1996 Act.[41/]

II. LOCAL ORDINANCES THAT OPERATE TO IMPOSE RIGHTS-OF-WAY OBLIGATIONS AND FEES ONLY ON NEW ENTRANTS VIOLATE SECTION 253

Section 253 of the 1996 Act establishes a Federal policy that bars state and local laws that prohibit or have the effect of prohibiting competitive entry into local telecommunications markets.[42/] While Congress preserved local government authority to impose "fair and reasonable" right-of-way management regulations and fees on telecommunications providers, such requirements and fees are lawful only if they are applied "on a competitively neutral and nondiscriminatory basis."[43/] These limits on local authority were designed to eradicate the

[40/] Notice at ¶ 71.

[41/] Even where states pass laws intending to curb unreasonable or unfair municipal ordinances, NEXTLINK and Lightpath find that municipalities resist complying with such state laws. In Ohio, state law specifically prohibits municipalities from discriminating among telecommunications or cable service providers, and from levying any tax, fee, charge, or non-monetary compensation for the right or privilege of using or occupying the public rights-of-way (except for construction permit fees, which are limited to the recovery of direct costs incurred by the municipality). §§ 4939.02-04. Laws that were in effect on or before December 31, 1998 are grandfathered. Despite this clear prohibition, various municipalities have insisted on charging right-of-way fees. The City of Cincinnati, for example, has produced an ordinance from 1891 applicable to the "City and Suburban Telegraph Association, a corporation organized under the general laws of the State of Ohio," which it claims gives them authority to charge all telecommunications providers such fees, although the ordinance nowhere mentions such fees and is clearly limited to one particular corporate entity. Many municipalities are simply ignoring the new statute and continuing to follow their existing franchising policies. Two cities (the City of Dublin and the City of Upper Arlington) are challenging the new statute in the Ohio courts and have sought a preliminary injunction, but it does not appear that any decision on their injunction request has yet issued.

[42/] 47 U.S.C. § 253(a).

[43/] Id.

legacy of government advantages enjoyed by ILECs in many local markets around the country,[44] since the continuation of such advantages could thwart the emergence of the competitive entry sought by Congress. As the Commission recognized in the Notice, "[f]ull and fair competition in the provision of local telecommunications service requires that competing providers have comparable access to the means of transporting signals."[45]

In enacting Section 253, "Congress directed the competitive neutrality requirement of § 253(c) to municipalities."[46] In the Troy case, the Commission affirmed that this requirement precluded local ordinances that imposed local right-of-way management obligations and fees only upon CLECs:

> One clear message from Section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither neutral nor nondiscriminatory.[47]

The Commission has construed the term "competitively neutral" to prohibit regulatory distinctions that give one provider an unfair regulatory or cost advantage over another.[48] Thus,

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[44] See 141 Cong. Rec. S8175-76 (daily ed. June 12, 1995) (statement of Senator Pressler) (noting serious problems with entry barriers created when cities and States granted exclusive franchises to monopoly service providers, imposed burdensome fees and requirements on new entrants seeking to compete with incumbent monopolists, or entirely refused to allow competition).

[45] Notice at ¶ 71.

[46] Austin II, supra, n.8, at *13.

[47] Troy, 12 FCC Rcd at ¶¶ 107-09. See also Silver Star Tel. Co., Inc. Petition for Preemption and Declaratory Ruling, 1998 FCC LEXIS 4358 ¶ 10 (Aug. 24, 1998). (rejecting "the view that a state legal requirement is competitively neutral as long as it treats all new entrants equally, regardless of whether it favors incumbent LECs over new entrants").

[48] See Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 8801 ¶47 (1997) ("Universal Service Report and Order"); see also Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22132 at ¶24 (1997) ("Competitive neutrality would require that separations rules not favor one telecommunications

to be "competitively neutral," local ordinances cannot give one service provider an appreciable cost advantage over another or have a "disparate effect on the ability of competing service providers to earn normal returns on their investment."[49] Laws that impose right-of-way regulatory burdens and fees only on CLECs clearly fail to meet the standards for competitive neutrality articulated by the Commission. As the Commission correctly observed, "Section 253(c) plainly requires that compensation requirements for use of the public rights-of-way must be imposed 'on a competitively neutral and nondiscriminatory basis.'"[50]

Carriers that use local rights-of-way in a similar manner must be subject to similar regulatory treatment by local governments. Federal courts have made clear that any analysis of the lawfulness of local telecommunications regulations and fees under Section 253 turns on the degree to which such requirements are related to carriers' "use" of the rights-of-way.[51] Thus, a facilities-based CLEC whose use of the local rights-of-way imposes no greater impact or burden (or imposes a lesser burden in terms of overall usage) than that of the incumbent carrier cannot be subject to regulatory obligations and fees from which the ILEC is exempt. While differences in local regulatory requirements and fee obligations may be justified based upon distinctions

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provider over another or one class of providers over another class"); Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21443-44 at ¶ 206 (1996); Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8419 (1996).

[49] See 11 FCC Rcd. at 8421, ¶ 135.

[50] Notice at ¶ 75.

[51] See, e.g., Bell Atlantic, 49 F. Supp. 2d at 819 (The 1996 Act "restricts the regulatory authority of local governments to . . . activities relat[ing] to the physical alteration, occupation, and restoration of the public rights-of-ways" and prohibits fees and burdens unrelated to "use of public rights-of-way"); Austin I, supra, n.8, 975 F. Supp at 942-43 (Under the 1996 Act, City may only impose regulatory obligations and fees related to telecommunications providers' "use" of the public rights-of-way).

regarding the extent to which carriers use local rights-of-way,[52] they may not be based upon a carrier's status or the type of services it provides. Two carriers whose facilities place the same burden on the public rights-of-way may not be treated differently, regardless of the service offerings of, or other differences between, those carriers.

In a Federal court challenge by TCG against a Dearborn, Michigan ordinance, the court correctly observed that Section 253 does "allow a local government to distinguish between providers based on their varying use of the rights-of-way."[53] The Federal court, however, then proceeded to misapply this standard, by holding that no discrimination was present even though, at the time the decision was issued, the City was imposing a 4% franchise fee on TCG, but not on Ameritech.[54] It is wholly inconsistent with the nondiscrimination and competitive neutrality requirements of Section 253(c) to hold that a new entrant that using less of a municipality's rights-of-way than an incumbent can be subject to burdensome requirements and substantial fees from which the incumbent is exempt.

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[52] See Dallas I, 8 F.Supp.2d at 593-94 (Competitive neutrality does not preclude municipalities from taking into account differences between carriers regarding the amount or manner in which they use local rights-of-way); Austin II, 1998 U.S. Dist. LEXIS 11508 at *9-14 (holding that new entrant could not be subject to right-of-way fees when providing service over another entity's facilities, since it was not placing an incremental burden on the rights-of-way, and rejecting the City's attempt to claim that it was required to impose fees on AT&T under Section 253 in order for its ordinance to remain competitively neutral, since it was the extent of use of the rights-of-way that was determinative).

[53] Dearborn, supra, n.9, 16 F. Supp. 2d at 792.

[54] Id. at 791-92. The court appeared to give considerable weight to the fact that the City was seeking to require Ameritech to enter into an agreement, even though no agreement was in effect at the time of the decision. Id. at 791. In that same decision, however, the court ruled that Ameritech's statewide franchise precluded the City from requiring Ameritech to enter into an agreement as a condition of continued operation in the City. Id. at 793-95. Thus, by the court's own ruling, Dearborn was in fact without power to remedy the competitive and regulatory disparity that the court believed the City was attempting to cure.

The City of Dearborn has maintained, however, that the disparate imposition of fees and franchising requirements on TCG vis-a-vis Ameritech is permissible due to TCG's failure to show that that the services that it provides, or plans to provide, were similar in nature and scope to those of the incumbent carrier, Ameritech.[55/] A Michigan state court erroneously accepted the City's argument that service-based distinctions constituted a permissible, non-discriminatory basis for distinguishing between providers for purposes of local right-of-way regulation.[56/] Widespread adoption of this rationale, however, would vitiate the nondiscrimination requirement of Section 253(c), since many CLECs may offer a different mix of services than ILECs, or initially furnish service to only a portion of a market, even though they are using the local rights-of-way in the same manner as the ILEC.

Section 253 requires that municipalities afford competitively neutral and non-discriminatory treatment to all "telecommunications providers."[57/] Congress could have, for example, limited the non-discrimination requirement of Section 253 only to municipal regulation of local exchange carriers, but instead opted to broadly apply the requirement to local regulation of all providers of telecommunications services.[58/] Local governments are therefore precluded from imposing regulatory distinctions based upon the type of telecommunications services provided by carriers. A fiber strand placed in a local right-of-way should be accorded similar

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[55/] TCG Detroit v. City of Dearborn, Case No. 98-803937-CK (Mich. Cir. Ct.) (June 17, 1999), slip op. at 10.

[56/] Id. The State court's rejection of TCG's discrimination claim was issued in connection with its construction of a Michigan state law, MCL 484.2253 (§ 253), requiring that "any fees and assessments" required of telecommunications providers by local governments be imposed "on a non-discriminatory basis." Id. at 8.

[57/] 47 U.S.C. § 253(c).

[58/] Cf. 47 U.S.C. § 251(a) - (b) (distinguishing between obligations imposed upon telecommunications carriers and local exchange providers).

treatment by municipalities regardless of the identity of the telecommunications carrier who owns that facility or whether the electrons transmitted over that strand carry local exchange, access, or some other type of telecommunications service.

Efforts to justify discriminatory local ordinances based upon an ILEC's universal service obligations are likewise unavailing.[59/] As a threshold matter, despite ILEC and municipal claims to the contrary, there is scant historical evidence or legal basis for contending that the broad statewide franchise rights furnished to the ILECs and their predecessors at the time of their formation in the 19th century – which purportedly insulate them from municipal regulations and fees imposed upon CLECs – were granted as a quid pro quo for a requirement to build-out their telephone networks to serve all residents in the state. To the extent that the ILECs and their predecessors received any reciprocal regulatory benefit in exchange for undertaking universal service obligations, it came via decades of government-guaranteed rates of return and monopoly franchises – and not in the form of a blanket exemption from local right-of-way regulation.[60/] Lacking any historical foundation or legal basis in state law, the universal service/network build-out justification offered in support of exempting ILECs from local right-of-way ordinances is nothing more than a post-hoc rationale for discriminatory treatment of CLECs.

[59/] TCG Detroit v. City of Dearborn, Case No. 98-803937-CK (Mich. Cir. Ct.) (June 17, 1999), slip op. at 9 (noting that complainant CLEC and Ameritech are dissimilar because "Ameritech provides universal phone service to Michigan residents, whereas TCG had only a handful of residential subscribers and did not solicit residential accounts"); see also Application of Bell Atlantic New York for Authorization to Provide In-Region, InterLATA Services in New York, NYPSC Case No. 97-C-0271, Joint Supplemental Affidavit of Bell Atlantic at ¶ 144 (filed April 13, 1999) (arguing that "neither RCN nor Cablevision are encumbered with the obligations to serve which BA-NY must shoulder.").

[60/] Cf. New York Tel. Co. v. North Hempstead, 41 N.Y.2d 691, 696, 363 N.E.2d 694 (N.Y. 1977) ("As to the town's police power: The Telephone Company acknowledges that the placement and its own use of its telephone poles are subject to reasonable police power regulation").

The 1996 Act clearly and unequivocally resolved this issue by precluding local governments from using universal service as a rationale for local ordinances that impose disparate obligations on CLECs vis-a-vis ILECs. In Section 253(b), Congress only reserved to States the authority to enact laws to preserve and advance universal service.[61/] Thus, municipalities cannot justify laws and requirements that discourage or burden new entry in violation of Section 253 by imposing disparate obligations on CLECs by invoking universal service.[62/] Congress reserved to municipalities only the authority to manage their rights-of-way in a nondiscriminatory manner, and provided no exception to this Federal limitation for local ordinances that discriminate due to universal service requirements or concerns.

In addition, the 1996 Act also precludes existing or new State laws that would permit enactment of discriminatory local ordinances as a means to advance universal service.[63/] Congress expressly required that State exercise of the authority reserved in Section 253(b) must be "competitively neutral and consistent with Section 254 of this title."[64/] State authorization of discriminatory local ordinances in the name of universal service would fail the test of

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[61/] 47 U.S.C. § 253(b); see Coral Springs, supra n.8, 42 F.Supp.2d at 1307 ("In Section 253, Congress made a distinction between the authority of states in subsection (b) and local governments in subsection (c). While states may regulate universal service . . ., local governments can only manage the public rights-of-way").

[62/] Dallas I, supra n.8, 8 F.Supp.2d at 591 ("cities do not have the more general authority to regulate to . . . advance universal service . . . this is a function reserved to States by § 253(b), not to local governments"); Troy at ¶ 106 ("section 253(b)'s reservation to the States of authority over issues such as universal service . . . appears to reflect Congress' view that an array of local telecommunications regulations that vary from community to community is likely to discourage or delay the development of telecommunications competition").

[63/] See, e.g., S. Rep. No. 104-23, 194th Cong., 1st Sess. (1995) at 35 (States may not exercise authority reserved by Congress for enactment of universal service measures "in a way that has the effect of imposing entry barriers or other prohibitions preempted" by 1996 Act).

[64/] 47 U.S.C. § 253(b).

competitive neutrality and contravene the framework of Section 254 by perpetuating "a false choice between competition and universal service."[65/]

Section 254 is designed to establish explicit, Federally-imposed mechanisms for providing universal service in a competitive environment.[66/] Through the operation of Commission regulations established to implement Section 254, CLECs are paying substantial sums of money to support universal service. State authorization of local telecommunications ordinance that impose disparate obligations on CLECs vis-a-vis ILECs in order to advance universal service would therefore be unnecessary, as well as unlawful. Indeed, a State law that effectively vests local governments with discretion to effectuate a municipally-administered, implicit subsidy for universal service – furnished in the form of an exemption from local regulations and fees – is wholly inconsistent with the competitive framework for universal service established in Section 254.

III. THE FCC HAS THE AUTHORITY TO DETER THE ENACTMENT AND ENFORCEMENT OF DISCRIMINATORY LOCAL ORDINANCES

The Commission should use this proceeding to make clear that municipalities are precluded by Federal law from enacting or enforcing local right-of-way ordinances that discriminate against CLECs and in favor of ILECs. While the decision in Troy has been helpful in providing courts with guidance regarding the scope and meaning of Section 253, the Federal policy of removing entry barriers, eliminating unnecessary and burdensome local regulation, and assuring competitive neutrality has not been fully embraced in all areas of the country.

[65/] Universal Service Order at ¶ 50.

[66/] 47 U.S.C. § 254; Universal Service Report and Order at ¶ 50 ("A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges"); Conference Report at 131 ("the conferees intend that any support mechanisms continued or created under new Section 254 should be explicit").

The Commission clearly has the authority under Section 201(b) of the Communications Act to establish Federal rules implementing the market-opening, competitive neutrality mandate of Section 253.[67] The Supreme Court, in AT&T v. Iowa Utilities Board, held, inter alia, that the FCC has general jurisdiction to implement the 1996 Act's local competition provisions under its authority set forth in Section 201(b).[68] The Court expressly stated that "Section 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."[69]

The Commission's rulemaking authority under Section 201(b), as affirmed by the Supreme Court, gives it the power to clarify and amplify the meaning and scope of Section 253 – either through the adoption of formal rules or the issuance of a policy directive. The Commission should make clear that the Section 253 mandate against entry barriers, including discriminatory practices by local governments, precludes municipalities from subjecting CLECs to obligations or fee requirements that local governments will not or cannot – due to alleged statewide franchise rights held by ILECs – impose on incumbent local service providers. Federal law requires that localities either impose local obligations and fees on all telecommunications providers in a non-discriminatory manner, or refrain from enacting such requirements. Perhaps most importantly, the Commission also should unequivocally confirm that a carrier's status, service offerings, or universal service and build-out obligations provide no basis for disparate treatment under local rights-of-way ordinances.

The Commission also could provide such guidance and clarification in the context of adjudicating a specific petition for preemption initiated under Section 253. Given the breadth of

[67] 47 USC §201(b). Section 201(b) provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."

[68] AT&T v. Iowa Utils. Bd., 119 S Ct 721, 730 (1999).

its rulemaking authority under Section 201(b), the Commission need not wait for such a petition to be filed in order to do so. Indeed, prompt issuance of a clear Federal policy regarding the critical importance of adhering to the competitive neutrality and nondiscrimination requirements of Section 253 would undoubtedly reduce the number of preemption petitions and/or court cases submitted regarding local rights-of-way ordinances. In that respect, the Commission would help further the Act's objectives by reducing the need for new entrants to litigate the competitive parity to which they are entitled under law, and thereby speed the emergence of new entry into local markets.

CONCLUSION

For the foregoing reasons, Lightpath and NEXTLINK urge the Commission to make clear that Federal law precludes local authorities from imposing right-of-way obligations and fees only on CLECs. The Commission also should make plain that regulatory and fee disparities based upon a carrier's status as an ILEC or CLEC, the type and mix of services provided, or universal service obligations imposed are barred by Section 253. To be lawful, local ordinances and fee requirements either not only must be fair and reasonable, they also must be imposed on all telecommunications providers in a non-discriminatory manner -- or they may not be imposed on any providers. Finally the Commission also should take this opportunity to reiterate in concrete terms that municipal ordinances that impose regulatory obligations and fee requirements that are unrelated to a carrier's use of local rights-of-way are impermissible.

69/ Id.

Respectfully submitted,

Christopher J. Harvie
Tara M. Corvo
Uzoma C. Onyeije
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004-2608
(202) 434-7300

Counsel to Cablevision Lightpath, Inc. and NEXTLINK Communications, Inc.

David Ellen, Esq.
Senior Counsel
Cablevision Lightpath, Inc.
1111 Stewart Avenue
Bethpage, NY 11714
(516) 390-5911

Daniel Gonzalez, Esq.
Director, Regulatory Affairs
Alaine Miller
Director, Regulatory and Public Policy
NEXTLINK Communications, Inc.
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, DC 20036
(202) 721-0999

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CERTIFICATE OF SERVICE

I, Margo B. Adams, hereby certify that on this 12th day of October 1999, I caused copies of the foregoing "Comments of Cablevision Lightpath, Inc. and NEXTLINK Communications, Inc." to be sent to the following by hand delivery to:

Christopher Wright
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8-C755
Washington, D.C. 20554

Thomas Sugrue
Chief
Wireless Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C252
Washington, D.C. 20554

Jeffrey Steinberg
Deputy Chief
Commercial Wireless Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4-C236
Washington, D.C. 20554

Joel Taubenblatt
Attorney
Commercial Wireless Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4-A260
Washington, D.C. 20554

ITS
445 12th Street, S.W.
Washington, D.C. 20554

M B Adams

Margo B. Adams

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